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November 29, 1988

JAN 10 1989

Ms. Maureen Kryger, Supervisor
New Hampshire Retirement System
169 Manchester Street, Building 3
Concord, New Hampshire 03301

Dear Ms. Kryger:

By letter dated November 4, 1988, you have inquired as to whether a current beneficiary of the New Hampshire Retirement System who retired on December 1, 1977, may purchase prior service credit under the provisions of RSA 100-A:3, VI. You state that the retiree became eligible for membership in the System on June 30, 1967, but that due to oversight by her employer, New Hampshire Hospital, she was not enrolled in the System until an unspecified later date. Apparently, the retiree has recently petitioned the Board of Trustees to obtain an actuary's statement to determine the cost of buying back prior service credit from the time between June 30, 1967 and the date upon which the retiree actually was enrolled in the System. See RSA 100-A:3, VI.

In order to determine whether this retiree may receive credit for the time in question, it is necessary to examine both RSA 100-A:3, VI and relevant case law. RSA 100-A:3, VI provides as follows:

If a member of this system or a predecessor system ceases to be a member and withdraws his accumulated contributions, and later again becomes a member and wishes to receive prior service credit for the previous time served as a member, or if a member wished to receive credit for the period which he was employed in a temporary, unclassified, or



Ms. Maureen Kryger, Supervisor
New Hampshire Retirement System
November 29, 1988
Page 2

nonclassified capacity or any other nonpermanent full-time employment with the duration of 6 months or more previous to becoming a member, he may petition the board of trustees to obtain an actuary's statement indicating the costs, providing he agrees to pay for the statement; and upon payment of the amount determined by the actuary and with approval of the board, he shall receive credit for his previous service, or the period served in a temporary, unclassified, or nonclassified capacity or other nonpermanent full-time employment of 6 months or more. In the case of an employer which through its own fault and not the fault of the employee, failed to enroll an eligible employee, at the time such employee became eligible, in this retirement system or a predecessor system as required by this section, the employer and not the employee shall pay the cost of the actuary's statement obtained under the paragraph, regardless of whether the employee is actually credited for his prior service. Any member who wishes to receive credit for service in a temporary, unclassified, or nonclassified capacity or other nonpermanent full-time employment of 6 months or more prior to becoming a member shall pay both the member annuity savings fund share plus accumulated earnings thereon and the state annuity accumulation fund share plus accumulated earnings thereon before receiving credit for such service.

Significantly, this subsection authorizes "members" to petition to receive credit for prior service. "Member" is defined as any person included in the membership of the retirement system, as provided in RSA 100-A:3. RSA 100-A:1, X. RSA 100-A:3, V provides in part that a member shall cease to be a member if he becomes a beneficiary. Finally, "beneficiary" is defined in part as any person receiving a retirement allowance. RSA 100-A:1, XI.

Here, the retiree in question retired on December 1, 1977, and presumably began receiving a retirement allowance at that time. Thus, she is now a beneficiary, and not a member of the System.

Ms. Maureen Kryger, Supervisor
New Hampshire Retirement System
November 29, 1988
Page 3

It might be argued that "member," as used in RSA 100-A:3, VI, should be construed more broadly than the definition of "member" that appears in RSA 100-A:1, X. Indeed, the preamble to RSA 100-A:1 states that the definitions there set forth shall apply "unless a different meaning is plainly required by the context" We see nothing, however, in RSA 100-A:3, VI that plainly requires a different meaning. It is reasonable to construe RSA 100-A:3, VI as not applying to beneficiaries. A beneficiary who purchased prior service credit would presumably be entitled to a retroactive adjustment of benefits previously paid, creating an administrative burden upon the system and creating the possibility that beneficiaries could wait until they had lived long enough past retirement so that the retroactive benefits owed equalled or exceeded the cost of buying back prior service.¹

Our determination that RSA 100-A:3, VI does not authorize this retiree's requested buy-back does not exhaust your inquiry, however. You note that in this case the failure to enroll the retiree during the period in question was the result of employer oversight. Thus, it is necessary to see if the retiree is entitled to receive credit for that period of time independent of RSA 100-A:3, VI.

In State Employees v. City of N. Belknap County, 122 N.H. 614 (1982), the New Hampshire Supreme Court addressed issues concerning the rights of certain employees who were not timely enrolled in the System by their employer, Belknap County. The Court noted that the employees were not seeking to become present members of the System, but instead were seeking compensation for past wrongs. The Court held that all eligible governmental employees had an enforceable right to benefits, and upheld the equitable remedy of permitting the employees to buy-back prior years of creditable service. Thus, certain employees who were not "members" of the System were permitted to buy back prior service credit pursuant to the Court's decision.

You have stated that the employer in the instant case has admitted that the failure timely to enroll the retiree was the result of employer oversight. Assuming the employer to be at fault, if the retiree would be entitled to buy-back her prior service credit under the holding of SEA v. Belknap County, then we would advise the System to permit the retiree and the employer to pay their respective shares into the System and

¹This problem would be more acute if the employer were liable to pay its share of the buy-back.

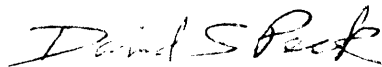
Ms. Maureen Kryger, Supervisor
New Hampshire Retirement System
November 29, 1988
Page 4

allow the requested buy-back of prior service credit. However, based upon the facts presented, the retiree is not entitled to any remedy in this case. In SEA v. Belknap County, the Court also held that a six-year statute of limitations applies to claims such as the one here at issue.² The six-year period begins to run at the time payments became due--the time of death or retirement. SEA v. Belknap County, 122 N.H. at 622. The statute of limitations bars any action by an employee whose suit was not commenced within six years after his or her death or retirement.

Here, the retiree retired on December 1, 1977. Thus, the six-year period during which she could have taken action on her claim against her employer expired in 1983, and the retiree could not now obtain equitable relief from a court allowing her to buy back the prior service credit at issue.

We conclude that the retiree is not authorized to buy back prior service credit in this case either under RSA 100-A:3, VI or pursuant to the decision of the New Hampshire Supreme Court in SEA v. Belknap County. I trust this fully responds to your inquiry. If you have additional questions, please do not hesitate to contact me.

Very truly yours,



David S. Peck
Assistant Attorney General

DSP:pad
cc: Mr. Harry Descoteau, Executive Secretary
Monica A. Ciolfi, Esquire

#0-88-059

²For causes of action arising on or after July 1, 1986, a three-year statute of limitations applies. Laws 1986, ch. 227:22, II; RSA 508:4.